IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL REVISION APPLICATION No. 531 of 2006

For Approval and Signature:

HONOURABLE MR.JUSTICE RAVI R.TRIPATHI

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1 Whether Reporters of Local Papers may be allowed to see the judgment?

2 To be referred to the Reporter or not?

3 Whether their Lordships wish to see the fair copy of the judgment?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder?

5 Whether it is to be circulated to the civil judge?

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BHIKHABHAI AMBALAL PATEL
Versus
STATE OF GUJARAT AND ANOTHER

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Appearance :
MR MG BAROT, SENIOR ADVOCATE with MR HRIDAY BUCH for the Petitioner
MR HL JANI, ADDITIONAL PUBLIC PROSECUTOR for Respondent No.1
MR SA BAQUI for Respondent No.2

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CORAM : HONOURABLE MR.JUSTICE RAVI R.TRIPATHI

Date : 26/12/2006

ORAL JUDGMENT

1. **RULE**. Mr.H.L.Jani, learned Additional Public Prosecutor waives service of Rule on behalf of respondent No.1. Learned Advocate Mr.S.A.Baqui waives service of

Rule on behalf of respondent No.2.

2. Petitioner – original complainant is before this Court being aggrieved by order passed by the learned Sessions Judge, Gandhinagar in Criminal Revision Application No.101 of 2006 dated 21.07.2006, whereby the learned Sessions Judge, Gandhinagar was pleased to allow the Revision Application and directed the learned Judicial Magistrate First Class to issue summons with rider that, '...the accused shall not seek unnecessary adjournments' and further rider to the effect that, 'if the witnesses did (sic – do) not attend it shall be opened (sic – open) for the Court to pass a necessary order.'

3. The facts of the present case are that Criminal Case No.760 of 2002 is filed by the present petitioner – original complainant. The case was filed in the year 2002 for an offence under Section 138 of the Negotiable Instruments Act.

3.1 For variety of reasons like filing of various applications by the learned Advocate for the original accused, the matter is still pending for being decided. On every step – passing of an order, the matter is brought before this Court. That is how the accused is

avoiding the final outcome of the case for last 5 years.

3.2 At the fag end – it is not appropriate to say, 'at the fag end' because, 'the end' is not in sight, hence, it will be appropriate to say that, 'at this late stage', the original accused – respondent No.2 herein gave application Exh.94 (Annexure-C to this revision application) and prayed that, the persons mentioned therein be permitted to be examined as defence witnesses:

3.3 One person mentioned in the application – Exh.94 is Patel Madhubhai Gandalal – he is the father of the original accused – respondent No.2 herein. He is cited as a witness in Criminal Case No.760 of 2002. It is only after 5 years, the original accused could realize that he wants to examine his father as defence witness.

3.4 Similarly, at serial No.2, it is stated that, “conversant person from branch No.4-841, L.I.C. of India, Ahmedabad”

3.5 Mr.Baqui, learned Advocate for respondent No.2 – original accused while arguing this matter submitted that, 'conversant person' from branch No.4-841, L.I.C. Of India, Ahmedabad is required to be examined because one Patel Jayantilal Mafatlal had filed an application before the Director General of Police, Prevention of Economic

Offences, Gandhinagar on 07.08.2003 and copy of that application was sent to this branch No.4-841, L.I.C. of India, Ahmedabad. Therefore, a person should be allowed to be examined from that branch of L.I.C. so as to prove that Patel Jayantilal Mafatlal had sent a copy of application dated 07.08.2003 filed before the Director General of Police, Prevention of Economic Offences, Gandhinagar to this branch of L.I.C..

3.6 Third person named in the application to be examined as witness, is Patel Jayantilal Mafatlal. It is prayed in the application (Exh.94) that Patel Jayantilal Mafatlal should be directed to come with necessary papers relating to complaint filed by him dated 07.08.2003 before the Director General of Police, Prevention of Economic Offences, Gandhinagar and copy of which was sent to branch No.4-841, L.I.C. of India, Ahmedabad.

3.7 Learned Advocate Mr.Baqui submitted that this Patel Jayantilal Mafatlal is the person, who hatched conspiracy against present respondent No.2 – original accused and his father and therefore, he should be permitted to be examined as defence witness.

3.8 A person is sought to be examined as defence witness, who according to the original accused – respondent No.2 hatched a conspiracy against him and his

father.

3.9 In the considered opinion of this Court, there cannot be more strange thing then this. If at all the accused wanted to place certain material before the Court for Court's consideration, he could have done that by exploring any other source. To examine a person, who according to the respondent – original accused himself was hatching a conspiracy against the original accused – respondent No.2 herein and his father, it not only unheard of but is also uncalled for.

3.10 The fourth person named in the application to be examined as a defence witness is, Advocate, Shri J.C.Parmar. It is prayed in the application that this Advocate should be directed to come with copy of the notice issued by him dated 12.11.2002 to accused, Shri Madhubhai Gandalal Patel, on the instructions of his client, Shri Patel Jayantibhai Mafatlal.

3.11 Learned Advocate Mr.Baqui submitted that he wants to get it placed on the record of the case that Advocate, Shri J.C.Parmar, on instructions of his client, Shri Patel Jayantibhai Mafatlal had issued notice to the father of the original accused – respondent No.2 herein.

3.12 The fifth person who is sought to be examined as a

defence witness is, 'conversant person' from the office of the Registrar of Companies, Ahmedabad for bringing the entire record pertaining to a company registered at Registration No.-04-17185 on 26.02.1992 in the name and style of 'H B Fabrics Pvt. Ltd.' (learned Advocate Mr.Baqui says that the correct name of the company is 'S B Fabrics Pvt. Ltd.'), having its address at Chacharwadi, Vasna-Sarkhej-Bavla Road, Tal: Sanand, Dist: Ahmedabad.

3.13 Last but not the least, the sixth person named to be examined as a defence witness is, 'Rabari Tejabhai Bababhai'.

3.14 Learned Advocate Mr.Baqui submitted that this Rabari Tejabhai Bababhai is a person, who is also one of the persons, who is supporting said Shri Patel Jayantilal Mafatlal in hatching conspiracy against present respondent No.2 – original accused and his father.

3.15 Over and above this list of six persons, it is stated in the application that in addition to these persons, if any other (sic – more) persons are required to be examined as witnesses, either they will be produced or they will be called by getting summons issued.

4. Learned Judicial Magistrate First Class, Mansa taking into consideration the contents of the application

and the submissions made before him, allowed that application in part and allowed respondent No.2 herein – original accused to examine his father as a defence witness. Being aggrieved by the order passed by the learned JMFC, Mansa, the original accused – respondent No.2 herein preferred Criminal Revision Application No.101 of 2006, which was allowed by the learned Sessions Judge, Gandhinagar by order dated 21.07.2006. Against which, present revision application is filed before this Court.

5. The order passed by the learned Sessions Judge is a 'non-speaking' order. The only reason given by the learned Sessions Judge in the only paragraph of the order is as under:

> "[2] This Court has given a due consideration to the submissions advanced on behalf of the petitioner. Without entering into the merits and demerits of the case this Court is of the opinion that a sufficient, proper opportunity should be given to the parties to the issue and let there not be an impression to the fact that the rights guaranteed by the statute has been deprived of. At the same time it is also to be taken on record that the accused persons also should not considered it as taken as granted and should not go on seeking an adjournment unnecessarily. By considering the entire facts and circumstances of the case this Court is of the opinion that substance

appears in the revision and it required to be allowed and hence, following order."

5.1 Operative part of the order though referred to earlier, is reproduced for ready perusal:

" The revision petition stands allowed.

The learned Court of J.M.F.C. shall issue the summons, however, the accused shall not seek unnecessary adjournments. If the witnesses did (do) not attend the Court is shall be opened (open) for the Court to pass necessary order."

6. In entire order, not a word is mentioned as to how the learned Sessions Judge found the other 5 persons, i.e. other than the father of respondent No.2 herein – original accused, 'relevant' in a case of dis-honour of cheque under Section 138 of the Negotiable Instruments Act.

6.1 At this juncture, Mr.M.G.Barot, learned Senior Advocate appearing with learned Advocate Mr.Hriday Buch for the petitioner invited attention of the Court to the memo of Criminal Revision Application No.101 of 2006 filed before the learned Sessions Judge, Gandhinagar (Annexure-A). Even in the memo of the Criminal Revision Application, nothing is mentioned about the relevancy of other 5 persons, who are sought to be examined as defence

witnesses.

7. Mr.Baqui, learned Advocate for respondent No.2 emphatically submitted that, 'filing of application Exh.94 should not be considered to be an attempt on the part of the original accused – respondent No.2 to delay the entire proceedings'. He submitted that all these persons who are sought to be examined as 'defence witnesses' are relevant so as to bring the case of the original accused on record. He submitted that the 'defence' of the original accused should not be foreclosed by not allowing him to examine these persons as defence witnesses. Mr.Baqui invited attention of the Court to the affidavit dated 25.09.2006 filed by respondent No.2 herein, which is accompanied by annexures running into as many as 85 pages. He invited attention of the Court to almost every paper – annexures of the said affidavit and submitted that the persons named in the application Exh.94 are relevant and they should be allowed to be examined as defence witnesses to exercise the right of defence. The learned Advocate invited attention of the Court to paragraph No.2 of the affidavit dated 25.09.2006, which reads as under:

> “(2) That, during the Admission hearing of the present matter, I produce along with this affidavit the following documents, for perusal and

Consideration of the facts mentioned in the said documents by this Honourable Court, for arriving at the just decision of this matter."

7.1 He next invited attention of the Court to paragraph No.(3) of the affidavit, which consists of 9 documents along with their description, date of the document and page number. These 9 documents run into 85 pages, to which the attention was invited.

8. Mr.Baqui invited attention of the Court to an application addressed to the Director General of Police, Prevention of Economic Offences, Gandhinagar. This application is filed by Jayantibhai Mafatlal Patel on 07.08.2003.

8.1 Now if a copy of this application is already with respondent No.2 – original accused, an endorsement, 'copy to L.I.C. Branch Manager 4/841' then why 'a conversant person' from branch 4-841, L.I.C. of India, Ahmedabad is to be examined.

8.2 The submission of Mr.Baqui is that, 'the name of the present petitioner is at serial No.27 in application dated 07.08.2003, which consists of a list of the persons, who are defrauded by respondent No.2 herein – original accused and his father along with other 32 persons whose names are included in that list. It is

appropriate to note here that 'Tejabhai Bababhai', who is also sought to be examined as defence witness, also figures in that list. He is at serial No.9, whereas 'Patel Jayantibhai Mafatlal' is at serial No.1. When the copy of the application is already with original accused, the only object behind filing Exh.94 application could be nothing else then to delay the proceedings and thus, 'derail' the proceedings. The object is not only clear but also apparent from the contents of the application – Exh.94. This Court will not allow any such attempt to 'derail' the proceedings.

9. Learned Advocate Mr.Baqui invited attention of the Court to the following decisions:

I. **KAILASH CHAND AGRAWAL VS. STATE OF U.P.**, 1996 CRI. L.J. 927 (ALLAHABAD HIGH COURT) (Head Note (C) and paragraph No.6)

II. **RAVINDER BHATIA VS. SATNAM SINGH M.M. AND ANOTHER**, 1990 CRI. L.J. 2467 (DELHI HIGH COURT).

III. **JASWANT RAI AND OTHERS VS. STATE OF H.P.**, 2000 CRI. L.J. 1970 (HIMACHAL PRADESH HIGH COURT).

IV. **SMT. MALTI AND OTHERS VS. STATE OF UTTAR PRADESH AND ANOTHER**, 2000 CRI. L.J. (ALLAHABAD HIGH COURT) [Head Note (B)].

V. **SAU RANJANA SHIVAJI RAKHPASARE VS. SHIVAJI BAPU**

RAKHPASARE AND ANOTHER, 2004 CRI. L.J. 145 (BOMBAY HIGH COURT).

9.1 All these decisions are cited by learned Advocate Mr.Baqui in support of his contention that the right of hearing is not an absolute right and therefore, the learned Sessions Judge, Gandhinagar has not committed any error when he passed the order under challenge without affording an opportunity to the present petitioner – original complainant.

9.2 The question is not about 'the right of hearing', but the question is about the 'propriety'. As noted hereinabove – the order of the learned Sessions Judge is a 'non-speaking' order. He has not taken pains to discuss the matter. Not only that, he has not spelled out any reason for which he found the persons, who are sought to be examined as defence witnesses, relevant. This Court is not able to appreciate as to how a person, who is alleged to be a conspirator, can be examined as a defence witness, more particularly when the so called application filed by him is already in possession of the original accused. Therefore, in the considered opinion of this Court, none of these decisions are applicable to the facts of the present case.

10. Learned Advocate Mr.Baqui next relied upon following

decisions:

I. **OM PRAKASH VS. STATE OF REJASTHAN**, 2003 CRI. L.J. 4704 (RAJASTHAN HIGH COURT) [Head Note (B)].

II. **MADHUBHAI GANDABHAI PATEL VS. JOITARAM JIVIDAS PATEL AND 1**, 2005 (3) G.L.H. 535.

III. **GIRISHBHAI NATVARBHAI PATEL VS. STATE OF GUJARAT AND ANOTHER**, 2006 CRI. L.J. 3378 (GUJARAT HIGH COURT).

IV. **K.N.BEENA VS. MUNIYAPPAN AND ANOTHER**, AIR 2001 SUPREME COURT 2985 (From : Madras).

V. **HITEN P.DALAL VS. BRATINDRANATH BANERJEE**, AIR 2001 SUPREME COURT 3897 [Head Note (B)].

VI. **GOA PLAST (P) LTD. VS. CHIOO URSULA D'SOUZA**, AIR 2004 SUPREME COURT 408.

VII. **KUNDAN LAL RALLARAM VS. CUSTODIAN, EVACUEE PROPERTY, BOMBAY**, AIR 1961 SUPREME COURT 1316 (V 45 C 241).

10.1 Learned Advocate Mr.Baqui cited these judgments in support of his submission that, 'the original accused – respondent No.2 herein has a right to plead and prove that the cheque in question was not issued to discharge any lawful debt or liability'.

10.2 There cannot be any dispute about the proposition of law. It goes without saying that a person, who is an

accused can always have a right to prove before the Court that the cheque was not issued in discharge of a lawful debt or liability, but then, in the present case, as submitted by Mr.Baqui, the case of the original accused is that this particular cheque which is the subject matter of the proceedings, was lost and therefore, it was misused by the present petitioner – original complainant.

10.3 At this juncture, Mr.Baqui was asked to furnish certain details, viz. (1) when did the original accused come to know about loss of cheque? and (2) what action did he take immediately on his coming to know about loss of cheque?

10.4 Mr.Baqui could not give any satisfactory reply to these points. The matter was argued at length on 22.12.2006 and on that day, on instructions from the father of respondent No.2, who was present in the Court, Mr.Baqui, learned Advocate for respondent No.2 made a statement that, 'respondent No.2 has not filed any complaint about the loss of cheque, but he had immediately informed the bank about loss of cheque and requested to stop payment of the cheque'. Mr.Baqui was granted time to produce a copy of the request letter written to the bank for stop payment.

10.5 Today, when the matter is again taken up for

hearing, Mr.Baqui, learned Advocate for respondent No.2 submitted that he is not able to get a copy of his request letter because there was 'shifting of record of the bank' on account of which, the bank people are not able to give a copy of that letter.

11. In response to this submission, Mr.Barot, learned Senior Advocate appearing for the petitioner made available a certified copy of deposition of Patel Prahladbhai Sankabhai, who was serving as Branch Manager, Navnirman Co-operative Bank, Sola Branch, Ahmedabad in this very case, i.e. Criminal Case No.760 of 2002. This particular witness has in term stated that the accused has not given them any letter for stop payment of the cheques of their account.

11.1 The certified copy is taken on record.

11.2 Respondent No.2 – original accused and his father must have known this fact on the day, i.e. 22.12.2006, when time was sought to produce a copy of the letter, but to buy time and to delay further, may be by few days, a request was made to grant time to enable respondent No.2 – original accused to produce a copy of the letter written to the bank, requesting for stop payment.

11.3 This reflects the character of the person. The

conduct is evident that accused is out to but time under every available excuse.

12. In view of the aforesaid discussion, this set of decisions also do not have any application to the facts of the present case.

13. Learned Advocate Mr.Baqui next relied upon following decisions in support of his submission that there should not be denial for examining the defence witnesses and that at any stage, until the judgment is pronounced, a request can be made for examining the witnesses:

I. **T.N. JANARDHANAN PILLAI, VS. STATE**, 1992 CRI. L.J. 436. (KERALA HIGH COURT).

II. **MRS.MADHU BANSAL VS. SHRI DINESH KUMAR**, 1997 CRI. L.J. 2020. (PANJAB AND HARYANA HIGH COURT).

III. **BHADRAN VS. STATE OF KERALA**, 1993 CRI. L.J. 1966 (KERALA HIGH COURT).

IV. **CHANDRA SHELHAR VS. STATE OF RAJASTHAN**, 1992 CRI. L.J. 4039 (RAJASTHAN HIGH COURT).

V. **MOHANLAL SHAMJI SONI VS. UNION OF INDIA AND ANOTHER**, 32(2) GLR 972 (SUPREME COURT).

13.1 The aforesaid submission is required to be considered in light of the facts of each case and cannot be accepted as a universal rule. It is equally well

settled principle of law that a person should not be allowed to 'abuse the process of law'. If on the face of it, it is noticed by the Court that the accused is trying to 'derail' the proceedings, the Court can always reject the application and refuse the relief as as to stop the derailment of the proceedings.

13.2 In the present case, as discussed, it is a clear case where the original accused – respondent No.2 herein is trying to 'derail' the proceedings by citing any person as a defence witness, to an extent that he is citing so called conspirator – who according to him had hatched a conspiracy against respondent No.2 and his father as a defence witness, is nothing but a very calculated and motivated attempt on the part of the original accused and therefore, none of these decisions come to the help of the original accused – respondent No.2 herein.

14. In this very matter, earlier, Special Criminal Application No.1412 of 2005 was filed by present respondent No.2 – original accused. The same was disposed of by this Court (Coram : J.R.Vora, J.) by judgment and order dated 28.06.2006. The relevant part of the judgment and order is reproduced hereinbelow:

> “3 In a trial in Criminal Case No. 760 of

2002, at the end of trial, present applicant accused vide Exhibit 42 filed an application that he intended to examine hand writing expert and, therefore, cheque in question be forwarded to hand writing expert with his admitted hand writings made in vakalatnama, etc.

3(There is duplication of paragraph No.3) The question arose in the trial under Section 138 of the Negotiable Instruments Act that present applicant - accused admitted the signature of the cheque in question but took a defence that the hand writing in the body of the cheque, except signature, were not written by him. As against that, the case of the complainant is, the said cheque was handed over to him and hand writings in the body of the cheque were not written in his presence.

4 Therefore, the situation comes to this that it is established fact that the cheque has been signed by the accused, but admittedly complainant has not proved that the hand writings in the body of the cheque are of the accused. Along with this, it is the defence also of the accused that though the cheque contains his signature, but the writing in the body of the cheque did not belong to him.

5 In this view of matter, in the trial, it is an established fact that the cheque in question bears the signature of the accused, but the writing of the cheque, except signature, are not proved to be of the accused. When this is the situation, it is not necessary that the cheque be sent to the hand writing expert to ascertain the hand writings in the

body of the cheque except signature did not belong to the accused.

6 The application at Exhibit-42, ought to have been dismissed by the learned Judge for the aforesaid reasons. However, the learned Judge entered into appreciation of the evidence and stated that the application was tendered for the delay of the trial and hence dismissed the application and the Revision filed against the said order below Exhibit-42 also was dismissed.

7 In this view of matter, though Exhibit - 42 preferred by the accused in Criminal Case No. 760 of 2002 stands dismissed for the reasons as aforesaid by this Court and the reasons assigned by the Magistrate deciding Exhibit - 42 and the reasons assigned by the Revisional Court.....”

14.1 At this juncture, few relevant facts are required to be noted, which will disclose the mind of the original accused.

14.2 Learned Senior Advocate Mr.Barot appearing for the petitioner submitted that the complainant had served notice to the original accused. **The said notice was not replied by the original accused**.

14.3 Mr.Baqui, learned Advocate for respondent No.2 submitted that the notice was not replied because notice was not received by the original accused as he was not residing at the address to which the notice was sent.

14.4 At one stage it was submitted that, 'after the cheque was lost', a complaint was filed. But then, at a later stage, it was disclosed that, 'the complaint was filed by the father of respondent No.2 – original accused and not by him'.

14.5 On further inquiry, it was disclosed that the complaint referred to hereinabove was for 'loss of cheque by the father of respondent No.2, relating to the cheques belonging to him (his father) and not for the cheque which is the subject matter of the present proceedings.

14.6 It is further interesting that 'complaint' filed by the father of respondent No.2 – original accused was also filed subsequent to filing of a complaint under Section 138 of the Negotiable Instruments Act. The complaint under Section 138 was filed on 16.12.2002 (page No.68 of the memo of the revision application), whereas the complaint for loss of cheque was filed on 12.03.2003 (page No.57 of the memo of the revision application). Interestingly, father of respondent No.2 – original accused in the matter of loss of cheque, did not give any intimation to the bank and filed only a complaint, that too, after the proceedings under Section 138 were filed. IT is further interesting that though it was alleged that the cheques were lost at Ahmedabad, the complaint was

filed at Patan, which was rejected on 30.04.2003 on the ground that Patan Court has no jurisdiction for loss of cheque at Ahmedabad.

14.7 All these things taken together leaves no doubt in the mind of the Court that here is an accused, who is taking the Court for ride and he is smart enough to 'derail' the proceedings and to see that the proceedings under Section 138 of the Negotiable Instruments Act are not proceeded with.

14.8 It will not be out of place to remind ourselves the object for which the present provision – speedy trial – speedy resolution of the dispute under Section 138 of the Act were inserted. The whole object is frustrated by the accused by his willful and well designed action in the matter.

15. Learned Senior Advocate Mr.Barot appearing for the petitioner submitted that though not directly, but as it is disclosed, the conduct of present respondent No.2 may be taken into consideration. Earlier on 06.12.2004, respondent No.2 – original accused had filed an application Exh.50 praying that one Chandrakant Ambalal Patel be examined as a witness. Later on, on 03.01.2005, he filed another application Exh.54 praying that he may now be dropped as a witness.

15.1 Mr.Baqui, learned Advocate for respondent No.2 submitted that application Exh.54 was filed praying that Chandrakant Ambalal Patel be dropped as a witness because the document which the accused wanted to produce before the Court and prove by examining Chandrakant Ambalal Patel, were admitted later on by the complainant and therefore, this request was made.

15.2 Learned Senior Advocate Mr.Barot appearing for the petitioner pointed out that this is not the reason mentioned in application Exh.54. He submitted that on the contrary, the reason mentioned is that as it is not convenient to Shri Chandrakant Ambalal Patel to appear as a witness, therefore, respondent No.2 – original accused be allowed to drop him as a witness.

15.3 This Court is at loss to understand as to if the contents of the document which the accused wanted to produce and prove by examining said Shri Chandrakant Ambalal Patel as a witness, if were admitted by the complainant, why this fact was not mentioned in application Exh.54 and why some other story was put forward in application Exh.54. All this reflects the character of the original accused – respondent No.2 herein.

16. In view of the above discussion, order dated

21.07.2006 passed by the learned Sessions Judge, Gandhinagar in Criminal Revision Application No.101 of 2006 is quashed and set aside, whereas order passed by the learned JMFC, Mansa below Exh.94 in Criminal Case No.760 of 2002 is restored.

16.1 Taking into consideration the age of the litigation, the learned JMFC, Mansa is directed to give priority to hearing of this case and decide the same as expeditiously as possible, preferably on or before 31.05.2007 and report to this Court. Rule is made absolute.

16.2 At this juncture, as was expected, Mr.Baqui, learned Advocate for respondent No.2 prayed that this judgment and order be stayed for a period of 3 weeks.

16.3 As discussed hereinabove, here is an accused (respondent No.2), who is out and out to see that the proceedings of Criminal Case No.760 of 2002 do not proceed further. The request made by learned Advocate Mr.Baqui for respondent No.2 is rejected.

(RAVI R.TRIPATHI, J.)

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